# SUPREME COURT PENDING CASES

***The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.***

MERIBEAR PRODUCTIONS, INC. *v.* JOAN E. FRANK et al., SC 19721
*Judicial District of Fairfield*

**Whether California Court Lacked Personal Jurisdiction Over Defendant; Whether Contract to Facilitate Sale of Real Property Exempt From Home Solicitation Sales Act; Whether Trial Court Improperly Awarded Double Damages.** The defendants, Joan Frank and George Frank, were selling their Westport home, and they contracted with the plaintiff, a California corporation, to provide decorating and staging services to make the home more attractive to potential buyers. The plaintiff subsequently brought a breach of contract action against the defendants in California pursuant to a forum selection clause in the contract, and the plaintiff obtained a default judgment against the defendants in that action. The plaintiff then brought this action seeking to enforce the California judgment or, alternatively, damages for breach of contract. The trial court found George Frank liable for the foreign judgment and Joan Frank liable for breach of contract. The defendants appealed, and the Appellate Court (165 Conn. App. 305) affirmed the judgment. The Appellate Court rejected the defendants' claim that the trial court improperly enforced the California judgment against George Frank because the California court lacked personal jurisdiction over him, finding that George Frank had consented to the California court's jurisdiction by virtue of the contract's forum selection clause. The court explained that, while George Frank did not sign the contract, he was nevertheless subject to the forum selection clause because he had signed an addendum that was incorporated into the contract. The Appellate Court also rejected the defendants' claim that the contract was not enforceable against Joan Frank because it did not comply with the notice provisions of the Home Solicitation Sales Act, General Statutes § 42-134a et seq., noting that § 42-134a (a) (5) of the act exempts transactions "pertaining to the sale or rental of real property" from the its provisions. The court noted that the parties' transaction clearly pertained to the sale of their real property because the sole purpose of the agreement was to facilitate the sale of the defendants' home. Finally, the Appellate Court rejected the defendants' claim that the trial court improperly rendered judgment against George Frank in the amount of $259,746.10 and rendered judgment against Joan Frank in the amount of $283,106.45, where the defendants argued that the court thereby effec-

tively permitted the plaintiff to recover twice for the same harm. The court noted that, while the plaintiff could recover the full amount awarded by the trial court against either George Frank or Joan Frank, there was nothing in the record to indicate that the trial court intended that the plaintiff was entitled to recover double damages. The defendants appeal, and the Supreme Court will decide whether the Appellate Court correctly ruled that: (1) the California judgment was enforceable against George Frank, (2) the parties' contract was not governed by the Home Solicitation Sales Act, and (3) the trial court properly awarded the plaintiff damages against both George Frank and Joan Frank.

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BERNADINE BROOKS, ADMINISTRATRIX (ESTATE OF ELSIE WHITE) *v.* ROBERT POWERS et al., SC 19727

*Judicial District of Middlesex*

**Negligence; Governmental Immunity; Whether Appellate Court Properly Determined that a Jury Reasonably Could Conclude that Identifiable Victim, Imminent Harm Exception to Discretionary Act Immunity Applied Under Facts Here.** Elsie White's estate brought this action alleging that Elsie White died as a result of the negligence of two Westport police officers. On the stormy evening of the day before White was found dead, the officers were approached by a concerned citizen at a gas station who reported to one of the officers that there was a woman who appeared to need medical attention in a field just up the road. The citizen reported that the woman was not properly dressed for the severe weather and that she was standing with her hands raised to the sky. The officer said he would take care of the situation but joked about it when calling a dispatcher to relay the citizen's report. The officer asked the dispatcher to send another officer to the field, but the dispatcher failed to do so, and the police did not drive by the field until several hours after the report. The body of the woman, identified as White, was found the next morning floating in Long Island Sound, less than a mile from where White was last seen. The cause of her death was accidental drowning. The trial court rendered summary judgment in favor of the defendants, ruling that, as a matter of law, the police officers, as municipal employees, enjoyed discretionary act immunity from the plaintiff's claims and that the imminent harm, identifiable victim exception to discretionary act immunity did not apply. The Appellate Court (165 Conn. App. 44) reversed, holding that summary judgment was improper because there was evidence from which a reasonable jury could find that the immi-

nent harm, identifiable victim exception applied to defeat the defendants' immunity. The Appellate Court noted that the exception applies where it is apparent to a public official that his conduct is likely to subject an identifiable victim to imminent harm. The Appellate Court found that a reasonable jury could find from the evidence submitted that the citizen had sufficiently identified White as a potential victim of the storm and that it was apparent to the officers that White was at risk of imminent harm because they had all of the relevant facts of her situation before them. The Appellate Court then found that a reasonable jury could conclude that the officers had subjected White to a risk of imminent harm in that it was more likely than not that she would become a victim of the storm because the officers isolated her from any chance of help by falsely stating that they would take care of the situation, by reporting the incident to the dispatcher in such a way that suggested it was a joke rather than a true emergency, and by failing to respond to the situation themselves. The defendants appeal, and the Supreme Court will decide whether the Appellate Court used the correct standard for determining whether the harm was imminent and properly applied the identifiable victim, imminent harm exception to the facts of this case.

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PATRICK CALLAGHAN *v.* CAR PARTS INTERNATIONAL, LLC, SC 19755

*Compensation Review Board*

**Workers' Compensation; Whether, Where Injured Employee Recovered from Third Party, Employer Properly Allowed a Moratorium on Future Workers' Compensation Payments to Employee in the Amount of the One-Third Reduction in Reimbursement Authorized by General Statutes § 31-293 (a).** The plaintiff was injured in a work related motor vehicle accident. He brought a personal injury action against the tortfeasor, and that action was settled for $100,000. At the time of the settlement, the plaintiff's employer had paid him $74,226.04 in workers' compensation benefits in connection with the motor vehicle accident. The plaintiff netted $66,062 from the settlement of the personal injury action, and he reimbursed his employer two thirds of that amount, or $44,041.33, and retained the remaining $22,020.67 of the settlement proceeds. The employer subsequently refused to pay the plaintiff further workers' compensation benefits, arguing that it was entitled to a $22,020.67 credit for future benefits and a moratorium on further payments until the plaintiff had spent the $22,020.67 he had retained on workers'

compensation expenses. The plaintiff argued that the employer was not entitled to a moratorium on future payments, pointing to General Statutes § 31-293 (a), which was amended in 2011 to provide that, when an injured employee brings a civil action against a tortfeasor and recovers damages, "the claim of the employer shall be reduced by one-third of the amount of the benefits to be reimbursed to the employer . . . which reduction shall inure solely to the benefit of the employee. . . ." The trial commissioner ruled that the employer was entitled to a $22,020.67 moratorium on future payments, and the Compensation Review Board (board) affirmed that ruling. The board noted that, in decisions such as *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391 (2010), the Supreme Court has held that an employer's lien for workers' compensation payments on an injured employee's recovery from a third party includes a credit for future workers' compensation payments in the amount of the net proceeds recovered by the employee from the third party. While acknowledging that the 2011 amendment of § 31-293 (a) concerning a one-third reduction of the benefits to be reimbursed to an employer was ambiguous, the board found nothing in the legislative history of the amendment evidencing any intent to change the law as interpreted by the Supreme Court in *Thomas*. The plaintiff appeals, and the Supreme Court will determine whether the board properly construed § 31-293 (a) to allow an employer a moratorium on future workers' compensation payments in an amount equal to the one-third reduction permitted by the 2011 amendment to the statute.

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ALISON BARLOW *v.* COMMISSIONER OF CORRECTION, SC 19774
*Judicial District of Tolland*

**Habeas; Ineffective Assistance of Counsel; Whether § 51-183c Required that Habeas Court Recuse Itself from Conducting Proceedings on Remand; Whether Habeas Court Improperly Barred Petitioner from Presenting New Evidence on Remand to Prove Prejudice.** The petitioner brought this habeas action alleging, among other things, the ineffective assistance of his trial counsel. The habeas court dismissed the claim, and the petitioner appealed. The Appellate Court reversed the judgment dismissing the ineffective assistance claim, concluding that, as a matter of law, the petitioner's trial counsel had performed deficiently in failing to advise the petitioner adequately regarding a plea offer. The Appellate Court remanded the case to the habeas court for further proceedings on the issue of whether the petitioner was prejudiced as a result of his attorney's deficient

performance. On remand, the proceedings were presided over by the same judge who had presided over the initial habeas proceedings and who had issued the judgment that was reversed by the Appellate Court. The petitioner filed a motion for recusal under General Statutes § 51-183c, which provides that "[n]o judge of any court who tried a case without a jury . . . in which the judgment is reversed . . . may again try the case." The habeas court denied that motion and it also rejected the petitioner's claim that there should be a new evidentiary hearing on the prejudice issue, ruling that it would make the required finding on the basis of evidence that was already in the record. The habeas court then found that the petitioner was not prejudiced by his trial counsel's deficient performance and it denied the petition. The petitioner appealed, and the Appellate Court (166 Conn. App. 408) reversed and remanded the case for a hearing before a different judge for the purpose of determining whether the petitioner was prejudiced by deficient performance. The Appellate Court concluded that the habeas court improperly denied the petitioner's motion for recusal, ruling that § 51-183c necessitated that a different judge preside over the proceedings on remand. The Appellate Court also ruled that the habeas court had wrongly construed the Appellate Court's previous remand order as precluding a new evidentiary hearing on the prejudice issue. The respondent appeals, and the Supreme Court will decide whether the Appellate Court properly determined that § 51-183c required the habeas court to grant the motion for recusal. The Supreme Court will also consider whether the Appellate Court properly determined that the habeas court erred in barring the petitioner from presenting new evidence on remand for purposes of proving prejudice.

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AMICA MUTUAL INSURANCE COMPANY *v.* ANDREW MULDOWNEY et al., SC 19794

*Judicial District of Stamford-Norwalk*

**Insurance; Subrogation; Landlord/Tenant; Whether Appellate Court Properly Concluded that Insurer had Right of Equitable Subrogation against its Insured's Tenants.** The plaintiff insurer indemnified its insured, the owner of a single family dwelling, for water damage caused by the failure of the owner's tenants (defendants) to maintain the heat properly during their two-week absence from the premises. The plaintiff brought this equitable subrogation action seeking to recover from the defendants the sums it had expended to repair the premises. The trial court rendered judgment in favor of the plaintiff. The defendants appealed, claiming that the trial court

improperly determined that the plaintiff's claim for equitable subrogation was not barred under *DiLullo* v. *Joseph*, 259 Conn. 847 (2002), in which the court established a "default rule" that, where a lease is silent as to the possibility of subrogation, a landlord's insurer has no right of equitable subrogation against a tenant. The Appellate Court (166 Conn. App. 831) affirmed the judgment on determining that the considerations underlying the *DiLullo* rule—the likely lack of expectation regarding a tenant's obligation to be subject to subrogation and the economic waste arising from having multiple insurance policies on the same piece of property—were not present in this case. The court explained that, because the lease agreement here clearly stated that the defendants were to pay all damages associated with breaking any promise contained in the agreement, including using the heating system in a prudent manner, the defendants had adequate notice that they could be liable for damages associated with their negligent maintenance of the heating system, and this notice created an expectation of liability that was sufficient to avoid application of the *DiLullo* rule. The court additionally explained that the public policy considerations in *DiLullo* concerning the economic waste of requiring a tenant of a single unit in a multiunit commercial building to subrogate the landlord's insurer for harm the tenant caused to the entire building were demonstrably lacking in the present case, which concerned a single family dwelling. The defendants appeal, and the Supreme Court will decide whether the plaintiff had a right of equitable subrogation against the defendants under *DiLullo*.

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A BETTER WAY WHOLESALE AUTOS, INC. v. COMMISSIONER OF MOTOR VEHICLES, SC 19815

*Judicial District of New Britain*

**Motor Vehicles; Whether Appellate Court Correctly Concluded that Finding that Car Dealer had Violated General Statutes § 14-54 by Selling Cars from an Unapproved Lot was Unsupported by the Evidence.** General Statutes § 14-54 provides that "any person who desires to obtain a license for dealing in motor vehicles . . . shall first obtain and present to [the Commissioner of Motor Vehicles] a certificate of approval of the location for which such license is desired from [the town or city] wherein the business is located. . . ." The Commissioner of Motor Vehicles (commissioner) found that the plaintiff car dealer violated § 14-54 by selling cars from a lot on which the plaintiff stored hundreds of cars. The commissioner determined that, while the plaintiff had obtained approval from the

town of Naugatuck to store cars on the lot, it had not obtained approval from the town to sell cars from that location. The trial court sustained the commissioner's finding that the plaintiff had violated § 14-54. The plaintiff appealed, and the Appellate Court (167 Conn. App. 207) reversed the trial court's judgment, ruling that the record lacked substantial evidence to support the determination that the plaintiff had violated § 14-54. It reasoned that the record was devoid of any evidence that the plaintiff, consistent with a desire to obtain a license to deal in motor vehicles at the storage lot, failed either to obtain a certificate of approval from the town or to present such a certificate to the commissioner as required by § 14-54. The Appellate Court also rejected the commissioner's claim that § 14-54 requires car dealers to obtain licenses for each location on which they wish to operate a car dealership. The commissioner appeals, and the Supreme Court will determine whether the Appellate Court correctly concluded that a car dealer's license is not conditioned upon local approval for each proposed location pursuant to § 14-54. It will also decide whether the Appellate Court correctly concluded that the administrative record lacked substantial evidence to support the finding that the plaintiff violated § 14-54.

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JOHN DOE *v.* TOWN OF WEST HARTFORD et al., SC 19828
*Judicial District of Hartford*

**Statute of Limitations; Whether Genuine Issue of Material Fact Existed as to Availability of Savings Statute; Whether § 52-593a Could Save Cause of Action Despite Serving Officer's Failure to Endorse Date of Delivery of Process.** The plaintiff brought this action alleging various incidents of wrongful conduct on the part of the defendants between May 22, 2007, and June 8, 2007. A state marshal served the defendants on June 9, 2010, one day after the expiration of the latest applicable statute of limitations. The defendants moved for summary judgment, claiming that the plaintiff's claims were time barred. The plaintiff objected, claiming that the action was timely under General Statutes § 52-593a, which provides that a cause of action shall not be lost if process is delivered to a marshal within the limitations period and the marshal serves it within thirty days of the delivery to the marshal. The plaintiff submitted an affidavit from his former attorney attesting that the marshal had picked up the process at the attorney's office on May 20, 2010, thereby saving the causes of action under § 52-593a. The defendants moved to strike the affidavit on the ground that it was not based on the attorney's personal knowledge,

and they attached a copy of the attorney's deposition testimony indicating that the attorney did not personally observe the marshal pick up the process. The trial court struck the affidavit and rendered summary judgment for the defendants, finding that the plaintiff failed to establish a genuine issue of material fact that process had been delivered prior to the running of the statutes of limitations. The plaintiff appealed, and the Appellate Court (168 Conn. App. 354) reversed the judgment in favor of the defendants. The court determined that, even without consideration of the attorney's affidavit, the attorney's deposition testimony raised a genuine issue of material fact as to whether the marshal received process on May 20, 2010, as he testified about following his office practice of leaving urgent process on a front counter for the marshal to retrieve and about not seeing it there later. The Appellate Court also concluded that the marshal's failure to comply with § 52-593a (b) by endorsing the date that process was delivered to the marshal on the return did not preclude application of the statute's saving provisions, concluding that § 52-593a (b) is directory rather than mandatory and that the failure of the marshal to include the date on the return is not a fatal defect. The defendants appeal, and the Supreme Court will decide whether the Appellate Court properly (1) reversed the judgment in favor of the defendants on determining that a genuine issue of material fact existed with respect to the availability of the savings statute, § 52-593a, and (2) concluded that § 52-593a is available to save a cause of action despite the failure of the serving officer to endorse on the return the date of delivery of the process to such officer pursuant to § 52-593a (b).

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*The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.*

*John DeMeo*
*Chief Staff Attorney*

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